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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 248

FRANK M. DeFINO,
PETITIONER,

v.

THE UNITED STATES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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THE UNITED STATES,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Claims entered on January 25, 1963.

Opinions Below

No printed opinion of the United States Court of Claims was reported. The defendant issued a typewritten copy to the petitioner of an opinion not handed down by the United States Court of Claims appears as Appendix F.

The opinion of the U. S. Court of Appeals appears as Appendix D.

The opinion of the District Court appears as Appendices A and B.

Jurisdiction

The typewritten opinion and Judgment in the United States Court of Claims were dated and entered January 25, 1963 Appendix F. The Petitioner's timely motion or petition for re-hearing was filed on February 18, 1963, and denied on April 5, 1963. The Jurisdiction of this Court is invoked under Title 28 U.S.C. 1254 (1).

Part One
Statutes Involved

The Regulations of the Department of the Air Force, Performance Rating Act Public Law 873, Sections 12 and 14 of the Veterans Preference Act. Air Force Manual 40-1 implementing and authorizing the establishment under the Executive due process by civilian authority. See Government No. II.

Air Force Regulations 40-1 Plaintiff's Exhibit "B" U. S. Court of Claims. This regulation implements the Performance Rating Act.

"The basis for retention: Civil Service Position." Follows:

(7)(A) "A Satisfactory rating or better is required for consideration for promotion.

(7)(B) "A Satisfactory rating or better shall be attained for Step Grade, and within step grade increases.

Air Force Regulations 40-14 Section 8 E Page 5.

"Employees receiving Unsatisfactory ratings shall not be retained in their positions. They are either separated, demoted, or transferred."

Air Force Regulations 40-14 page 2 par. (d). The basis for Removal: Unsatisfactory Performance.

"Conduct and attitude is considered only if it could be clearly shown that it has affected the employees performance or that of his co-workers:"

Mis-Conduct resulting in Satisfactory Performance is a bar for removal by this regulation. It is prohibited, and illegal.

Performance Rating Act Public Law 873: Consistent with Air Force Regulations.

"The basis for removal under this act shall be Unsatisfactory Performance." Civil Service Employees shall receive ratings corresponding to:

Outstanding, Satisfactory, and Unsatisfactory.

"No employee or Officer shall be issued an Unsatisfactory rating without a prior 90 days warning."

The regulations of the Air Force and the Performance rating act shall be followed in order to show just cause for removal under section 14 of the Veterans Preference Act.

Part Two

The Department of the Air Force Regulations 40-19 consistent with and implementing Air Force Manual 40-1 Chapter E2 and Air Force Manual 40-1 Section 1 and 2 Incorporated in Gov. Exhibit No. II U. S. Court of Claims. Petitioner's Exhibit "C".

Air Force Regulations 40-19 Section 5 E Page 2: Federal Agency The United States Air Force Cambridge Research Center L.G. Hanscom Field Bedford, Mass., a civilian installation.

(5E) "*Grievance Procedure Committee:* An ad hoc Body consisting of four members. At least 3 of the four members will be civilian members of the same Grade and civilian employees of the Air Force Cambridge Research Center. (AFCRC). The fourth committee member will be a representative of the civilian personnel office serving as a non-voting chairman. The committee is a fact finding and advisory board, or body. *Its primary purpose is to assist the Commander in arriving at a prompt and fair decision.*

Civil Service Regulations Part 22:

"Authorizes the issuing of a Proposed Notice of Removal thirty days in advance of the Final Decision of removal providing the Performance rating act was followed and the issuing of an unsatisfactory rating to show cause for removal." Applicable to preference eligible employees only for just cause outlined here in accordance with sec. 14 of the Veterans Preference Act."

Air Force Manual 40-1 Incorporating Public Law 600 79th Congress 60 Stat 809, 5 U.S.C. sec. 22A, the Secretary of the Air Force is authorized to delegate to subordinate officials of the Secretary, the power vested in him by law *to take action on personnel matters.*

Delegation of Authority: Air Force Manual 40-1 par 5b page 5 Government Exhibit No. II, filed U. S. Court of Claims. From the Secretary of the Air Force to:

> "Commanding Officers of Installations maintaining a central civilian personnel office are authorized to take final action effecting civilian personnel To:
>
> Promote, demote, compensate, assign, and *separate civilian employees, providing such personnel actions are in accordance with the existing statutory regulations and statutory requirements, and procedures.*

Public Law 600: The subordinate official to the secretary of the Air Force is the commanding general at the U. S. Air Force Cambridge Research Center, the Federal Agency where the petitioner was employed under civil service law.

The Regulations and Procedures that an Executive shall follow are the regulations implementing the Performance rating act and the regulations mentioned above Air Force Regulations 40-19 par. 5 E. No civil service employee at this installation shall be removed without a hearing before discharge.

The Authority under the law to Carry Out the Orders of the Executive; the Commanding General at the U. S. Cambridge Research Center, the Federal Agency involved.

Air Force Manual 40-1 Section 2: The Establishment of Civilian Authority. Page 3 (Government Exhibit No. II filed U. S. Court of Claims.

"*Section 2 Air Force Manual 40-1 par. "A"*:

"Central Civilian Personnel Office: The civilian organization unit of the installation, (Air Force Cambridge Research Center), in which the personnel functions outlined in *section 2 are consolidated and carried out.*

It is the only office at the installation with final responsibility to *Act For the Commander in carrying out* those functions."

"*B" Staff Civilian Personnel Office:* The Organizational Unit at Major Command Headquarters Acts for the Commander, the Commanding General in Conducting the Civilian Program throughout the Command."

"*1" Policy:* It is the Basic Policy of the Air Force that Authority and responsibility for effective civilian personnel actions be vested in Commanding Officers of the Installations Maintaining a Central Civilian Personnel Office.

In the Interest of efficiency and economy the functions of civilian administration will be consolidated and carried out through One Civilian Personnel Office.

Based on the Concept that the civilian personnel program is an Integral part of over-all Management.

The Civilian personnel office will assist supervisors and operating Officials of effecting a sound program

of employee Management relations and solving personnel problems.

"No Military Official in any Capacity has the authority to carry out his own order to separate or dismiss an employee from office." The above law prohibits such military actions.

Veterans Preference Act Section 14, Title 5 U.S.C. Sec. 863, June 1944 as Amended:

"*No permanent or indefinite preference eligible employee*, who has completed a probationary or trial period employed *in the Civil Service;* or in any establishment, agency, Bureau, administration project, hereinfore referred to *shall be discharged*, suspended *for more than thirty days*, furloughed without pay, reduced in rank or compensation, or debarred for future appointment, except for such cause that will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty-days is sought shall have at least thirty-days advance written notice (except where there is reason to believe the employee be guilty of a crime for which a sentence of imprisonment can be imposed,) stating any and all reasons, specifically and in detail for any such Proposed Action, such preference eligible shall be allowed a reasonable time for answering the same personally and in writing and for furnishing affidavits in support of such answer, *and shall have the right to appeal to the Civil Service Commission*, from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of

notice of such adverse decision: Provided, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission, after investigation and consideration, of the evidence submitted, the civil service commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends.

SECTION 12 VETERANS PREFERENCE ACT: JUNE 27 44 58 STAT 387 5 U.S.C. SUP. 851 ET SEQ.

Sec. 12: "In any reduction in personnel in any civilian service of any Federal Agency, competing employees shall be released in accordance with civil service commission regulations which shall give due effect to tenure of employment, military preference, length of service and efficiency ratings: Provided, that the length of time spent in the Armed Forces of the United States of each such employee shall be credited in computing length of total Service: Provided Further, That Preference employees whose efficiency ratings are good or better shall be retained in preference to all other employees and that preference employees whose efficiency ratings are good or better shall be retained in preference to all other competing employees, and that preference eligible whose efficiency ratings are below good shall be retained in preference to all other competing non-

preference employees who have equal or lower efficiency ratings: And provided further, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency or agencies shall appoint additional employees for any other source for such positions."

Executive Order 10577 of January 1955, by the President of The United States.

"Federal Agency: The U. S. Air Force Cambridge Research Center Bedford, Mass., issued by this Order a Career Appointment in the U. S. Civil Service Of The United States in the Position the Petitioner held with this Federal Civil Agency."

"A Career civil service Satisfactory employee shall have the right to transfer, promotions, and will be the last effected in a reduction in force. A Career appointment Satisfactory employee shall have reinstatement rights in the U. S. Civil Service of the United States."

Performance Rating Act: A rating of satisfactory issued by law under this act shall be considered good of a preference eligible employee consistent with section 12 of the Veterans Preference Act in a reduction in force.

Air Force Regulations 5-25: (Air Force Manual 40-1 Sec. 2 P. 3 (R-Ex. 2)

"All personnel Actions shall be carried out *for the Commander.*"

(R-Exhibit B 40-14 and C 40-19) Plf's Exhibits and (R-Gov. Ex. No. H) reference to the above laws.

Questions Presented

1. Where the regulations of the Department of the Air Force and under Public Law 600 require the Executive to decide and effect dismissal of a civil service employee by due process of Civilian Authority, does a Surprise Military Discharge by a deputy commander in defiance of Departmental regulations who had decided and carried out his own military order of discharge directly under part 22 of civil service regulations rendered invalid and unconstitutional?

2. To determine whether the petitioner a preference eligible employee was entitled to the protection of the civil service commission, and refusing to do so was the civil service commission Arbitrary and Capricious, when it departed from the law and its civil service procedures?

3. To determine whether the petitioner a preference eligible employee was entitled to relief in the U. S. Court of Claims where the U. S. Appeals Court sustained the military discharge of the petitioner without cause under section 14 of the veterans preference act, granting relief to other employees under this same issue of law and not to the petitioner?

4. Was the petitioner entitled to relief in the U. S. Court of Claims where the military discharge was issued in defiance of Departmental regulations of the Air Force and in conflict with applicable decisions of the U. S. Supreme Court?

5. To determine whether a Department of the Air Force, High Command reduction in force order of preference eligible employees under section 12 of the veterans preference act for retention, precluded a Surprise Military Discharge under part 22 of civil service regulations rendered invalid under section 12 of the Veterans Preference Act?

6. To determine whether the petitioner was entitled to the right to face his accuser in a court of law?

Statement

The petitioner, an American citizen veteran of World War II a Career Satisfactory civil service employee of 15 years four months Federal Service with the U. S. Government filed a petition in the U. S. Court of Claims on January 18, 1962. The petitioner claimed his civil service pay and allowances plus damages after thirty days of dismissal from his civil service position based on the ruling of the U. S. Court of Appeals sustaining the petitioner's dismissal without cause under section 14 of the veterans preference act. (See R-66) Deft's first brief, admitted by the defendant in the U. S. Court of Claims.

Under section 14 of the veterans preference act dismissal of a preference eligible employee without causes cannot be sustained without continuing the employee's pay. This law states in part:

"No preference eligible employee of permanent or in-

definite status in the civil service of the Government in any agency, shall be discharged for more than thirty days, suspended, or furloughed without pay, Except *for Cause* that would promote the efficiency of the Service." (Veterans Preference Act section 14 of June 1944 Title 5 U.S.C. 863.)

On a Second Issue the petitioner claimed relief in the U. S. Court of Claims to recover his civil service pay and allowances plus damages from the effective date of dismissal where on May 28, 1957 effective June 28, 1957 the petitioner's received a surprise military discharge by a military subordinate who had decided and carried out his own military order of separation directly under part 22 of civil service regulations pretending to be the Executive of the civilian installation where the petitioner was employed, the United States Air Force Cambridge Research Center, in defiance of department of the Air Force regulations under part 1 implementing the Performance Rating Act, and under part 2 the regulations of the Air Force implementing Public Law 600 requiring the Executive of a Federal civilian agency to decide and effect dismissal by due process of civilian authority outlined in (R-Ex. Gov. Ex. No. II).

PART I
AIR FORCE REGULATIONS 40-14
(PLFF'S R-EX. B)

The regulation 40-14 par 8 E page 5 states in part:

> "Employees receiving unsatisfactory ratings are not to be retained in their positions. They are either demoted, transferred, re-assigned, or *separated*."
> (Pltf's R-Ex. 40-14 B)

Where it was determined by civilian authority that petitioner is entitled to be retained in his position an official satisfactory rating was issued under Air Force Regulations 40-14 par 7 A and B. This regulations states:

> "A satisfactory rating is required for promotion and within step grade increases."

The petitioner under the law could not be a candidate for promotion and removal at the same time, nor could the petitioner be satisfactory and unsatisfactory at the same time.

In the case of *Lettle* v. *Wilson* No. 2355-55 the District Court held the dismissal of an employee invalid where the employee had received an within grade step increase subsequent to receiving an official unsatisfactory rating where the regulations of the Department of the Army required an employee shall attain a satisfactory rating to be eligible for promotions and within step grade increases, the District Court held that the within grade step increase received by the employee placed the employee on a satisfactory standing and cancelled out the unsatisfactory rating and warning notices the employee had and declared removal of the employee invalid.

The Department of the Air Force regulation is the same as the Army regulation and an official satisfactory rating received by the petitioner serves to cancel out the military dicharge of the petitioner.

On May 28, 1957 only 5 days after the petitioner received his official satisfactory rating by due process of civilian authority there were no charges of any kind filed or preferred against the petitioner for removal or any other disciplinary action. The petitioner did not receive any notification at all of any unsatisfactory charges from noone, prior to this date.

At 4 p.m. on May 28, 1957 the petitioner received by Sur-

prise a military discharge by an unknown military subordinate to the Executive.

Headquarters
Air Force Cambridge Research Center
AF Research and Development Command
Laurence G. Hanscom Field Bedford, Mass.

May 28, 1957

In reply Address:
Commander

Attn:

Subject: Notice of Proposed Removal
6520th Maintenance Squadron (Military Organization)
Air Force Cambridge Research Center
Laurence G. Hanscom Field
Bedford, Mass.

1. This notice is issued in accordance with the provisions of part 22 of the Civil Service Regulations. You are hereby given ot less than thirty days (30) days notice commencing the day following receipt of this letter of Proposed Action to remove you from this center.

Your reply must be in writing within seven days from receipt of this notice. A written reply should be brought or mailed to Colonel Woodrow W. Dunlop Installation Commander, Air Force Cambridge Research Center, L. G. Hanscom Field, Bedford, Mass.

If you so desire you have the right to a personal appearance, and reply in writing.

No action to remove you from your position will be taken until a Final Decision is made.

WOODROW W. DUNLOP
Colonel USAF
Installation Commander

Part 2
The Proposed Notice of Removal Also Violates the Regulations of the Department of the Air Force 40-1 Chapter E2 and 40-19.

Under Air Force Manual 40-1 Chapter E2, consistent with Air Force Regulations 40-19 par 5 E page 2 (R-Pltf's Ex. C) requires that a civil service employee of the Air Force Cambridge Research Center is entitled to a hearing before discharge, by due process of civilian authority under the Executive consistent with Public Law 600.

The Military Proposed Notice of Removal directed the petitioner *only* to a personal appearance under section 14 of the veterans preference act. The personal appearance was also denied the petitioner when Col. Dunlop disappeared from his office after signing both at the same time the Military Proposed Notice of Removal and the Removal notice but had Capt. Sleeth who actually contacted Col. Dunlop to frame the petitioner by a military discharge issued the Military Discharge separately from the Proposed Military notice of removal. (See R-Pltf's Ex. 1C affidavit of Judy Casserly testifying to the disappearing of Col. Dunlop after issuing the proposed notice of removal.)

Where Col. Woodrow W. Dunlop deprived the petitioner the right to a personal appearance under section 14 of the veterans preference act, also deprived the petitioner of a hearing before discharge when he Col. Dunlop had directed the petitioner only to a personal appearance and latter disappeared from his office.

The regulation AFM (Air Force Manual 40-1 Chapter E2 and Air Force regulations 40-19) requires a hearing before discharge by civilian authority as follows:

Chapter E2 AFM 40-1.

GRIEVANCE COMMITTEE: An ad hoc Body consisting of four members. At least three of the four member's will be civilian employees of the Air Force Cambridge Research Center. (AFCRC). The fourth committee member will be a representative will be a representative of the civilian personnel office, serving as a non-voting chairman. The committee is a fact finding advisory body. Its primary function is to assist the Commander in arriving at a prompt and *fair decision.*

This regulation of Air Force Manual 40-1 Chapter E2 should have been noted in the proposed notice of removal dated May 28, 1957, if there was any intention of respecting the petitioner's right to a hearing by the Department of the Air Force under due process of civilian authority. (Pltf's R-Ex. 40-14 par 5 E page 2).

The petitioner was denied the right to a hearing before discharge and also denied the right to a personal appearance.

The Executive of the Federal Agency the U. S. Cambridge Research Center.

The Executive of the civilian installation where the petitioner was employed was the Commanding General William M. Morgan, Maj. General. This commanding officer only had authority to decide whether the petitioner should or should not be dismissed from his position, under Public Law 600 Title 5 U.S.C. 22A. (See R-Pltf's Ex. No. 4).

The civilian personnel officer, only had authority to carry out the orders of the Executive and sign the removal notice. (See R-Gov. Ex. No. 11 section 2 page 3, and Pltf's R-Ex. No. 5).

THE FALSIFIED MILITARY DISCHARGE
Copy Located in Gov. Exhibit 1
"Exhibit J"

Headquarters
Air Force Cambridge Research Center
Laurence G. Hanscom Field **Bedford, Mass.**

In reply Address:
The Commander

June 6, 1957

Attn:
Subject: Notice of Final Decision
6520th Field Maintenance Squadron (Military Organization)
U. S. Air Force Cambridge Research Center
Bedford, Mass.

1. You are hereby notified that final decision has been made to remove you from your Career Appointment at this center effective the close of business June 28, 1957. It has been determined that your removal is for such cause that would promote the efficiency of the service. *The decision was made in accordance with part 22 of civil service regulations.*

If you desire you may appeal this decision under the Air Force Grievance procedures established by Chapter E2 of Air Force Manual 40-1 must be made in writing within thirty days from the effective date of dismissal June 28, 1957.

If you appeal to the Air Force after your removal *you are not permitted* to appeal to the civil service commission, your appeal to the Air Force will be cancelled.

WOODROW W. DUNLOP
Colonel USAF
Installation Commander

The petitioner points out to this court Col. Dunlop was not installation commander of the U. S. Cambridge Research Center as his title appears on the military discharge. The military subordinate held the title of deputy commander of Air Force Cambridge Research Center. This the defendant admitted. (See R-199) The deputy commander also had another military title that of installation commander of the military organization 6520th Air Base Group under the Executive the Commanding general, located along side of the civilian installation the U. S. Air Force Cambridge Research Center. The Commanding general was over-all the commanding officer and Executive of both the military and the civilian installations located at the Bedford Airfield. (See R-Pltf's Ex. No. 4).

The defendant also admitted Col. Dunlop had decided and carried out his own military order of separation. (R-56).

Therefore, Col. Dunlop had violated Public Law 600 Title 5 U.S.C. section 22 A, in making the decision to remove the petitioner, as deputy commander pretending to be the Executive, and also violated Air Force Manual 40-1 section 2 par A, B and C page 3 when Col. Dunlop carried out his own military order of separation in defiance of this regulation of the Air Force, where this regulation authorizes the civilian personnel officer to carry out the order of the Executive the commanding general by due process of civilian authority. (See R-Gov. Ex. No. 11).

In the case of *Wickersham* v. *U. S.*, 1906 Ct. Cl U.S. S. Ct. 409 201 U.S. 397 L.Ed. 799 the U.S. Supreme court held dismissal of an employee by a subordinate to the Executive invalid.

In the case of *Service* v. *Dulles*, 354 U.S. 363 1 Ed. 2d 1403 and *Helen I. Watson* v. *U. S.*, No. 49895 the Supreme Court held dismissals of employees invalid where their

Federal Agencies failed to follow their own regulations in dismissing a Civil Service employee.

These invoked cases are identical to the petitioner's case where the military discharge by a deputy commander pretending to be the Executive and in defiance of due process of civilian authority under Air Force Regulations evidenced in (R-Gov. Ex. No. II) the petitioner's dismissal is also invalid, and entitled by the above authorities a writ of certiorari to the United States Court of Claims.

The petitioner filed a timely appeal to the civil service commission asserting the same contentions in the petition, to the United States Court of Claims. The civil service commission departed from the law and its usual civil service procedures, in conflict with the regulations of the Air Force implementing the performance rating act, sustaining the petitioner's military discharge.

The petitioner filed a complaint in the U. S. District Court, holding petitioner's dismissal invalid on September 16, 1959, and denying that motion of the defendant for summary judgment, appears in appendix A.

The U. S. District Court departed from the Law on June 28, 1960, and reversed the decision of the District Court in departure of its usual judicial procedures, appears in appendix B.

The U. S. Appeals Court on February 23, 1961 held the military discharge of the petitioner is without cause under section 14 of the veterans preference act, and in departure of law and its usual judicial procedures denied the petitioner's constitutional right to due process of appeal before three Judges of the U. S. Appeals Court to deprive the petitioner of an order to reverse the decision of the District Court, appears in appendix D.

The petitioner filed petition in the U. S. Court of Claims to recover his civil service pay and allowances based on the U. S. Appeals Court ruling sustaining petitioner's dismissal

without cause under section 14 of the Veterans Preference Act, and on a second issue where the military discharge was issued in defiance of Air Force regulations implementing and authorizing due process of civilian authority under the Executive prior to dismissal, appears in appendices E & F.

The U. S. Court of Claims denied petitioner relief where the U. S. Court of Claims had granted relief to other civil service employees on the same issue of law.

Accordingly, by authority of the invoked cases herein representing applicable decisions of the U. S. Supreme Court the petitioner is entitled as a matter of constitutional law a writ of certiorari to the U. S. States Court of Claims.

Reasons for Granting the Writ

1. To Determine the Question Whether a Federal Civilian Agency of the Department of the Air Force Shall Comply With Its Own Regulations Requiring the Executive to Decide and Effect Dismissal by Due Process of Civilian Authority Prior to Discharge, Does a Surprise Military Discharge Issued to a Civil Service Employee by a Military Subordinate Who Had Decided and Carried Out His Own Order of Dismissal Pretending to be the Executive in Defiance of Department of the Air Force Regulations Rendered Invalid and Unconstitutional?

There are applicable Decisions on this Question by the United States Supreme Court. This Honorable Court has declared invalid dismissals of Federal Employees under civil service where Federal Agencies of the United States failed to comply with their own regulations prior to exercising civil service regulations.

In the case of *Helen I. Watson* v. *U. S.*, No. 49895 decided by the United States Supreme Court on June 4, 1958, held

that the regulations of the Department of the Army were violated where the reason given for the employee's Unsatisfactory Conduct were not in compliance with regulations of the Department of the Army.

The U. S. Supreme Court had ordered three Judgments against her vacated. Also in the case of *Service* v. *Dulles*, 354 U.S. 363 (1957), the U. S. Supreme Court held employee's dismissal invalid where the State Department failed to comply with its own regulations in dismissing Federal Employee, and ordered all back pay and allowances due employee from the effective date of dismissal.

In the case of *Wickersham* v. *U. S.*, 201 390 (1906), the U. S. Supreme Court held dismissal of employee invalid because dismissal of employee was decided and carried out by a subordinate, to the Executive. Thus the above companion cases are directly applicable to the petitioner's case here in the U. S. Supreme Court. The U. S. Court of Claims refused to declare Petitioner's dismissal invalid and grant monetary Judgment on applicable decisions of the U. S. Supreme Court in the companion cases where the petitioner's suit in the U. S. Court of Claims to recover his civil service pay and allowances rested on the same issues of law, where the petitioner's Military Discharge by a military subordinate to the Executive, who had decided and carried out his own military order of separation in defiance of department of Air Force regulations is also invalid and unconstitutional. The civil service regulations quoted by Col. Dunlop in the falsified military discharge was part 22 of civil service regulations pretending his illegal military actions were in accordance with civil service regulations.

The U. S. Supreme Court held that a dismissal of a Federal civil service employee directly under civil service regulations in defiance of departmental regulations of a Federal agency is invalid. Where the Constitution of the

United States provides and guarantees a complete separation of military and civilian authority, the military discharge is invalid and Unconstitutional. The Constitution also provides and guarantees safeguards to American Citizens from military actions and military suppression from taking away their livelihood under any form of military action in the United States.

Accordingly, in accordance with applicable decisions of the United States Supreme Court the petitioner is entitled to a writ of certiorari to the United States Court of Claims.

II. To Determine Whether the Civil Service Commission Was Arbitrary and Capricious When It Departed from the Law and Its Usual Civil Service Procedures.

The petitioner filed a timely appeal to the civil service commission asserting the same contentions presented by this petition under the regulations of the Air Force implementing the performance rating Act under part 1 and under part 2 the regulations of the Air Force requiring the Executive to decide and effect dismissal of a civil service employee under due process of civilian authority, and under section 14 of the veterans preference act.

On July 9, 1957 the civil service commission held a hearing at the First Regional office of the civil service commission at Boston, Mass. This hearing was soon biased by the military.

Without invitation and without authority a military subordinate Captain Keith R. Sleeth, had appeared at the civil service commission hearing of the petitioner. (R-211)

The presence of the military was the reason the petitioner's representative an attorney named Robert Ready withdrew from the case prior to the hearing on July 9, 1957, 10 minutes before the hearing was to take place, to-

gether when the petitioner's attorney at law read Capt. Sleeth's affidavit to support the petitioner's military discharge, had influenced an unfair decision from the civil service commission before the hearing started. This is evidenced by the fact Capt. Sleeth moved to frame the plaintiff and wanted the petitioner removed from his civil service position for his own interest and not in the interest of the Department of the Air Force.

The First regional office sustained the military discharge of the petitioner after it held the petitioner's dismissal or any dispute that may have arisen should have been decided by the highest local authority, the commanding general as the regulations require under the Grievance Procedures of the Air Force. (R-Civil service commission transcript page 9 and 10.)

The petitioner filed a timely appeal to the U. S. Civil Service Commission Board of Appeals and Review, Washington, D. C., on September 14, 1958.

The military again notified the civil service commission to sustain the petitioner's removal and the action by the military.

The petitioner complained to the civil service commission to the Board of Appeals and Review that the military had interfered with the hearing at the Boston office and informed the civil service commission Appeals Board that the appearance at the hearing by Capt. Sleeth influenced an unfair decision and suppressed the petitioner's rights to a fair hearing, and submitted an affidavit to support the petitioner's removal.

The civil service commission at Washington, D. C., informs the petitioner Capt. Sleeth had authority to be at the hearing for the military agency effecting the dismissal. The petitioner informed the civil service commission that the petitioner was not in the military service under Col. Dunlop and Capt. Sleeth. The petitioner informed the civil

service commission that he was employed by the civilian agency the Air Force Cambridge Research Center and the military had no authority to take action or interfere with civilian affairs effecting personnel actions or civilian affairs before the civil service commission effecting a fair hearing.

The civil service commission, on Feb. 7, 1958 sustained the military discharge of the petitioner, ignoring the petitioner's affidavits, and civil rights to the protection of the regulations of the Air Force, the Performance Rating Act, and section 14 of the Veterans Preference Act.

The Decision of the Civil Service Commission was as follows:

R. "Exhibit 10"
United States Civil Service Commission
Washington, D. C.

Feb. 7, 1958

Mr. Frank M. DeFino
28 Greenwood St.
Lowell, Mass.

Dear Mr. DeFino:

This is to inform you that the Civil Service Commission had sustained the decision of the regional office of the civil service commission removing you from your position with the U. S. Air Force Cambridge Research Center effective June 28, 1957.

The civil service commission is fully aware that you have received an official satisfactory rating. The basis of your removal is your conduct resulting in satisfactory performance.

Your dismissal from your position as an Electrical Technician from the U. S. Air Force Cambridge Research Center is in accordance with part 22 of civil

service regulations. The removal action by the Federal agency is sustained.

For the Commissioners:

(Unsigned) JOHN E. BLANKENSHIP
Chairman, Board of
Appeals and Review.

The petitioner points out to this court that the unofficial decision was made by a clerk in departure of law the regulations of the department of the Air Force and the Performance rating act Public Law 873. The basis of removal under the Performance Rating Act shall be Unsatisfactory Performance where it is mandatory to issue an Unsatisfactory rating to show cause for removal under section 14 if the Veterans Preference Act prior to exercising part 22 of civil service regulations.

The civil service commission used the word misconduct as an excuse to over-ride the regulations of the Air Force implementing the Performance Rating Act.

Where the reasons given by the Federal Agency, and the Civil Service Commission as an excuse for issuing a military discharge do not comply with the regulations of the Air Force implementing the Performance Rating Act such a dismissal is not for cause and is illegal. The U. S. Supreme Court in the case of *Helen I. Watson* v. *U. S.*, No. 49985, held that the reasons given for the employee's misconduct did not comply with the regulations of the Department of the Army and ordered three Judgments against her vacated and issued an order to that effect to the U. S. Court of Claims in view of the *Service* v. *Dulles* case where the U. S. Supreme Court held that Federal Agencies shall comply with their own regulations prior to exercising civil service regulations part 22.

Therefore, the petitioner's case here is identical where the reasons given by the military and the civil service commission of the alleged misconduct resulting in satisfactory performance do not comply with the regulations of the Air Force implementing the Performance Rating Act to show cause to remove a preference eligible satisfactory Career civil service employee under section 14 of the Veterans Preference Act and part 22 of civil service regulations.

The Civil Service Commission was Arbitrary and Capricious When it pretended John Blann was Chairman and a member of the Board of Appeals and Review.

The civil service commission had departed from its civil service procedures when it allowed a clerk employed by that office of the civil service commission to make the decision in departure of law, and sign the name of Mr. John Blann as a pretended Chairman of the Board of Appeals and Review who had heard and determined the petitioner's Appeals under section 14 of the Veterans Preference Act implementing the Performance Rating Act and the Regulations of the Air Force 40-14.. (See R-Deft's Ex. No. 12).

The letter of February 7, 1958 shown herein Petitioner's (R-Exhibit 10) displaying the falsified signature of John E. Blann evidenced by the name signed or written in by a clerk is evidenced by the letter "H" symbolizing the initials of the clerk signing the name of John E. Blann, as pretended Chairman, of the Board of Appeals and Review of the Civil Service Commission.

Evidence Presented

In R-Exhibit 12 of the defendant paragraph Nine an answer by the defendant to the Petitioner's Complaint in

the District Court filed on Feb. 4, 1959, after investigation by four attorneys of the Justice Department states:

> Par. 9 Admitted, Except it is denied that defendants John E. Blann and Newton Steely were members of the Board of Appeals and Review which heard and determined the plaintiff's Appeal in this case.
>
> (s) E. Riley Casey
> *Asst. U. S. Attorney*
>
> (s) Wm. Leverick
> *U. S. Attorney*
>
> (s) Oliver Gasch
> *U. S. Attorney*
>
> (s) Edward G. Troxell
> *U. S. Attorney*

The above admitted arbitrary actions, on the part of the civil service commission pretending it had heard and determined the Appeal of the Petitioner is a direct denial of the petitioner's preference rights under section 14 of the veterans preference act, and a direct refusal to protect the petitioner as a preference eligible Satisfactory Career employee from military suppression and dictatorial methods is a direct impeachment of civil rights of all preference eligible employees as well as a direct impeachment of the civil service merit system and the civil service commission itself. The civil service commission has permitted military infiltration of military doctrines to suppress civil rights of all civil service employees. The military discharge issued by Surprise on May 28, 1957 effective June 28, 1957, by a military subordinate pretending to be the Executive is evidence of military suppression of the petitioner as well as other civil service employees.

The civil service commission permitted military suppression of civil rights of the civil service employee.

Therefore, the civil service commission upheld a military discharge to civil service employees, issued by the Department of the Air Force in defiance of departmental regula-

tions implementing the Performance Rating Act, in defiance of departmental regulations requiring the Executive to decide and effect dismissal by due process of civilian authority, in defiance of section 14 of the Veterans Preference Act, and in defiance of part 22 of civil service regulations. The civil service regulation part 22 does not authorize a military deputy commander to issue a Surprise military discharge in defiance of department of the Air Force Regulations implementing and authorizing, due process of civilian authority under the Executive, prior to dismissal.

The petitioner a veteran preference eligible satisfactory Career civil service employee was entitled to a fair decision and a fair hearing by the civil service commission in accordance with the laws mentioned above. The civil service commission refused to uphold applicable decisions of the United States Supreme Court in the cases invoked herein.

In the case of *Green* v. *McElroy et al.*, 360 U.S. 476 3 L. Ed. 2d 1377, the U. S. Supreme Court held employee was entitled to a fair hearing. This companion case is applicable here. Accordingly, the evidence is conclusive by the admittance and investigation of those attorneys at law named of the Justice department, that Mr. John Blann was not chairman or a member of the Board of Appeals and Review, together with the evidence of the civil service commission's own letter of February 7, 1958 that the civil service commission had departed from the law and its usual civil service procedures deprived the petitioner his preference rights under section 14 of the Veterans Preference Act to appeal his illegal military dicharge to the civil service commission.

By authority of *Helen I. Watson* v. *U. S.* the decision of the civil service commission does not comply with the regulations of the Air Force implementing and requiring the Performance Rating Act to be followed in dismissing a Federal civil service employee at the U. S. Air Force Cam-

bridge Research Center where the petitioner was employed, therefore, petitioner is entitled to a writ of certiorari to the U.S. Court of Claims in view of the invoked cases above.

III. To Determine Whether the Petitioner is Entitled to Relief in the U. S. Court of Claims where the U. S. Court of Appeals Held the Military Discharge of the Petitioner Without Cause Under Section 14 of the Veterans Preference Act Granting Relief to Other Employee and Not to the Petitioner on the Same Issue of Law?

The petitioner was denied the right to relief in the U. S. Court of Claims based on the ruling of the U. S. Court of Appeals on February 23, 1961. The U. S. Appeals Court sustained the military discharge of the petitioner without cause under section 14 of the Veterans Preference Act; Title 5 U.S.C. section 863. (See R-66) (Defendant's Brief)

Section 14 states:

> "No preference eligible employee of permanent or indefinite status in the civil service of the Government employed in any agency of the Government shall be discharged, for more than thirty-days, suspended, or furloughed without pay, Except *for cause* that will promote the efficiency of the Service."

The U. S. Court of Claims granted relief to other employees where the U. S. Court of Claims reversed the decision of the U. S. Court of Appeals under section 14 of the Veterans Preference Act for failing to uphold this law, in the case of *Washington* v. *U. S.*; 344 147 Fed. Supp. 284 and granted relief to the employee.

The U. S. Court of Claims denied the petitioner's right

to the protection of law and the protection of the Federal U. S. Courts where the U. S. Appeals Court sustained petitioner's dismissal without cause under the same law, refusing the Petitioner relief. (See Appendix D).

IV. To Determine Whether a High Command Reduction in Force Order Under Section 12 of the Veterans Preference Act Renders Invalid a Surprise Military Discharge Directly Under Part 22 of Civil Service Regulations, in Defiance of Department of the Air Force Regulations, Authorizing Due Process of Civilian Authority?

The petitioner a Career Satisfactory preference eligible employee received by a surprise a military discharge on May 28, 1957 effective June 28, 1957 by a military subordinate deputy commander of Air Force Cambridge Research Center where the petitioner was employed under civil service law in defiance of the authority of the commanding general under Public Law 600 Title 5 U. S. section 22A, depriving the petitioner of a hearing before discharge under Air Force Regulations 40-19 par. 5 E page 2 (Plft's R-Ex. C), and in defiance of due process of civilian authority under the law in (R-Gov. Ex. H) page 3 A and B) where the civilian personnel officer only has authority to carry out and sign the orders by the Executive under part 22 of civil service regulations effecting civilian personnel actions of transfer, demotion, compensation, promotion, and separation. (See R-1 page 29 and 34) (Pltf's petition to the U. S. Court of Claims.)

In the cases of *Service* v. *Dulles*, 354 U.S. 363 1 Ed. 2d 1403, and *Helen I. Watson* v. *U. S.*, No. 49895 the U. S. Supreme Court held dismissal of civil service employee invalid directly, under part 22 of civil service regulations in defiance of departmental regulations where Federal Agencies shall follow their own regulations to effect dismissal

of Civil Service employees prior to exercising Civil Service regulations.

The civilian personnel officer R. M. Fitzpatrick of the Federal Agency of the United States Air Force Cambridge Research Center submitted defendant's (R-Ex. No. 32) making a direct confession to the issue of a high Command reduction in force Order to the Commanding general of the U. S. Air Force Cambridge Research Center ordering 262 positions abolished in a reduction in force. The Commanding General in April 1957, ordered the civilian personnel officer issue and carry out by signing 262 reduction in force notices to those effected to carry out the High Command reduction in force order of January 25, 1957. The reduction in force order entitled all preference eligible employees retention under section 12 of the Veterans Preference Act attaining a rating of satisfactory issued by law under the regulations of the Air Force implementing the Performance Rating Act. The civilian personnel officer only issued 261 reduction in force notices, and refused to issue the petitioner his reduction in force notice, withholding the reduction in force notice and refusing to inform the petitioner his position was on the reduction in force list. This information was withheld by the civilian personnel officer for 5 years and 8 months. The petitioner learned of this information in the U. S. Court of Claims after oral argument on January 7, 1963. If the petitioner's right to receive a reduction in force notice on May 28, 1957 was respected, the petitioner would have exercised his retention rights to another position or similiar one with the same Federal Agency where the petitioner's retention priority rights of tenure civil service credits of 15 years 4 months were of a higher priority under section 12 than any other Federal civil service employee in his position and grade. The petitioner would still be employed at the same Federal

Agency had he received a reduction in force notice, in one of 40 other positions the petitioner was qualified.

On May 28, 1957 the petitioner received a Surprise military discharge by a deputy commander pretending to be the Executive in defiance of department of the Air Force regulations directly under part 22 of civil service regulations in defiance of due process of civilian authority under section 12 of the Veterans Preference Act.

The regulation Air Force Manual 40-1 section 2, A and B was the same regulation the civilian personnel officer had followed when he carried out the order of the commanding general to issued 261 reduction in force notices, as the civilian personnel officer under the law would be ordered to comply with by order of the Executive in the case of a removal. (See R-Gov. Ex. No. II).

The civilian personnel officer, Col. Dunlop, and Capt. Keith R. Sleeth conspired to substitute a military discharge to the Petitioner by quoting part 22 of civil service regulations pretending it to be legal as long as they quote some law, instead of a reduction in force notice under section 12 of the Veterans Preference Act for retention. The petitioner's retention rights were violated.

The petitioner filed a petition for rehearing adding a new law section 12 of the Veterans Preference Act rendering invalid a military discharge under part 22 of civil service regulations.

The U. S. Court of Claims as well as the Federal Courts below refused the petitioner protection of the law and the protection of the U. S. Federal Courts, by refusing to protect the petitioner's livelihood and suppression of his civil rights by the military.

Where the petitioner cannot obtain a court order to protect his livelihood and civil rights from the military, then no other person can either. The Negroes can no longer

obtain a court order in order for the negroes to register in a school or college where they are rejected.

Unless the United States Supreme Court declares invalid and Unconstitutional the military discharge of the petitioner the military will continue to issue military discharges at will to civil service employees as they have since the one issued to the petitioner. The military action against civilian employees has spread along the eastern coast to North Carolina, and recently three more military discharges were issued to civil service employees at will that are now before the civil service commission from the petitioner's Federal Agency the U. S. Cambridge Research Center.

No Negro can be protected by the Federal U. S. Courts from the Governors of Alabama and Mississippi preventing Negroes from registering in a school or college, where the U. S. District Courts refuse to protect Civil Rights of Civil Service employees from military suppression.

The U. S. District Court's order to those Governors are useless on the grounds the Justice Department gave the petitioner the runaround in the Courts below deprived him of obtaining a U. S. Court of Appeals court order to reverse the decision of the District Court. The District Court refused to issue a Court order to the defendant to restore the petitioner to his civil service position. The Justice Department has seized the U. S. Courts in this case and perhaps in many others.

The petitioner filed a timely petition for re-hearing and in all things the petition was denied on April 5, 1963.

Pursuant to rule 30 of the U. S. Court of Claims the petitioner moved to subpoena Colonel Woodrow W. Dunlop asserting the petitioner's right to face his accuser in a court of law under the due process clause of the 14th Amendment to the Constitution. The U. S. Court of Claims refused the petitioner a court order to subpoena Col. Wood

row W. Dunlop and the petitioner's constitutional right to face his accuser in a court of law was violated. (R-257)

The U. S. District Court, the U. S. Appeals Court, have departed from the law and their usual judicial procedures refusing to protect the livelihood of the petitioner.

The U. S. Court of Claims refused to hand down a printed opinion allowed the Justice Department to issue the petitioner a typewritten opinion and seize the court where summary judgment was entered by the Justice Department for themselves. (R-219)

Accordingly, the petitioner's military discharge was sustained without cause under section 14 of the Veterans Preference Act, together on the issue where the Military discharge was issued by a deputy commander pretending to be the Executive in defiance of the regulations of the Air Force authorizing due process of civilian authority prior to discharge, the petitioner is entitled as a matter of Constitutional law a writ of certiorari to the U. S. Court of Claims.

By authority of applicable decisions of the U. S. Supreme Court in the cases of *Service* v. *Dulles*, *Helen I. Watson* v. *U. S.*; and *Washington* v. *U. S.* the United States Supreme Court should grant the petition for writ of certiorari to the United States Court of Claims.

Respectfully Submitted

(s) Frank M. DeFino
Frank M. DeFino
Petitioner

Attorney of Record:
(s) Frank M. DeFino
Frank M. DeFino
Attorney of Record
28 Greenwood St.
Lowell, Mass.

Appendices

The Federal U. S. Courts Have Departed from the Law and Their Judicial Procedures Seized by the Department of Justice in Non-Jury Trials

Appendix A

The United States District Court For the District of Columbia.

Civil Action No. 880-58
September 16, 1959

FRANK M. DEEINO,
Plaintiff,
v.
ROBERT MCNAMARA ET AL.,
SECRETARY OF THE AIR FORCE
Defendant.

Suit for a Court Injunction Ordering the Defendant to Restore Plaintiff to His Civil Service Position With Back Pay and Allowances

Before: Judge Holtzoff District Court Judge

Ruling: I think the matter should be tried. I do not think this case should be disposed of by summary judgment. I was impressed with the thought, namely, that there ought to be a complete factual record. I do not know of any case where an official making the charges could also sit in judgment of those charges, under the Lloyd-Lafollette Act. In order to have that point decided there ought to be a complete factual record. So I am going to deny the defendant's motion for summary judgment.

Issue: The plaintiff's military discharge was issued by Colonel Woodrow W. Dunlop on May 28 1957 effective

June 28, 1957 in defiance of the regulations of the Air Force implementing the Performance rating act.

Issue: That Col. Woodrow W. Dunlop who had made inefficiency charges, judged those charges decided and carried out his own military order of separation. Col Dunlop lacked authority to discharge in defiance of the Executive authority and in defiance of Air Force Regulations.

Court depositions were taken showing evidence of the regulations of the Air Force were violated implementing the Performance rating act.

The civilian personnel officer testified that the civilian personnel officer only has authority to carry out the orders of the commanding general the Executive effecting civilian personnel actions. These Court depositions were later set aside and ignored. The Justice Department on June 28, 1960 seized the District Court in this case. (See Appendix B)

The Justice department and the petitioner's attorney of Record co-operated to protect Colonel Woodrow W. Dunlop from facing the accused in a court of law. No complete factual record was made of Colonel Woodrow W. Dunlop's military actions against the petitioner removing him illegally from his civil service position.

Appendix B

The United States District Court
For the District of Columbia

Civil Action No: 880-58
June 28, 1960

FRANK M. DEFINO,
Plaintiff,
v.
ROBERT S. MCNAMARA ET AL.
SECRETARY OF DEFENSE
Defendants.

SUMMARY JUDGMENT

Entered in the Clerk's Record by a Negro Clerk of the District Court Mr. Hull on orders of the Justice Department using the name of Judge Youngdahl.

Entered Summary Judgment in favor of the defendant by Micro-Film Copy.

Before: Justice Department (Defendant's Attorney Mr. Oliver Gasch.)

Ruling: None

This cause coming on to be heard on Cross Motions for Summary Judgment after oral argument and careful consideration of the record on the Authority of *Thomas v. Ward*, 96 App. 302, 22, 5 F.2d 1957, and *Haggert v. Summerfield*, 100 App. D.C. 85, 243 F.2d 29 1957, it is by this Court

ORDERED that the motion of the plaintiff is hereby denied.

And it is further ordered that the motion of the defendant is hereby granted.

Unsigned: LUTHER YOUNGDAHL
District Judge

Micro-Film Copy 8½" x 11" second sheet typing paper.
To substitute an order of the District Court.

The *Thomas* v. *Ward* case is not applicable to the petitioner's case at all. The employee in the *Thomas* v. *Ward* case was a non-veteran removed by the Commanding General of that Naval Station by due process of civilian authority for cause where an unsatisfactory rating was issued to show cause for removal under the Lloyd-Lafollette Act.

In absence of issuing a 90 days warning notice prior to issuing an unsatisfactory rating to the Navy Dept. employee, the U. S. Appeals Court reversed the decision of the District Court and ordered the Judgment for the plaintiff vacated on the grounds the Navy Dep't contended that there was no regulation of the Navy Dep't requiring the issuing of a 90 days warning to an employee who was not qualified for his position and lacking knowledge of his position, affected his conduct resulting in inefficiency.

The petitioner a Department of the Air Force employee was not removed by the Commanding general, was not issued an unsatisfactory rating, but was rated Satisfactory for retention in accordance with the regulations of the Air Force 40-14 par. 7 A and B.

There are in existence the regulations of the Air Force prohibiting a misconduct charge be made if the employee's conduct does not render or affect his efficiency or performance.

The regulations of the Air Force require the Performance Rating Act removal procedures to be followed by issuing an unsatisfactory rating of a preference eligible employee under section 14 of the Veterans Preference Act. (R-Pltf's Ex. B Section 8 E page 5)

The petitioner was fully qualified having 15 years four months of civil service tenure for retention upon attaining an official Satisfactory rating in his Position, in accordance with the regulations of the Air Force implementing the Performance Rating Act. (Pltf's Ex. R-40-14 par. 7 A and

B) by the Petitioner's Federal Agency where he was employed.

The *Haggert* v. *Summerfield* case invoked by the defendant on the second issue is not applicable either to the petitioner's case. This case involves a Postmaster a politically appointed official of the Post Office Department not under civil service law. The employee's complaint to the Court was that he could only be removed by the President of the United States who appointed him to his position.

The court held the Postmaster General was the Executive of the Post Office Department and could act for the President of the United States.

In the Petitioner's case Colonel Woodrow W. Dunlop was a deputy commander of the Federal Ageney the U. S. Air Force Cambridge Research Center to the Executive the Commanding General, and lacked authority to issue a military discharge in violation of Public Law 600. In this case the Commanding General could only act for the Secretary of the Air Force. The Commanding General did not act to remove the petitioner.

Therefore, Col. Dunlop lacked authority to act as the Executive with duties as Deputy Commander. The Justice Department has seized the U. S. District Court and held Colonel Dunlop as a higher authority than that of a Commanding General and placed him as an authority equal to that of a Postmaster General in the President's Cabinet.

The U. S. Supreme Court cannot uphold this type of action in the U. S. District Court. The petitioner was denied the right to the protection of the U. S. District Court.

Appendix C

The United States Court of Appeals For the District of Columbia

Civil Action No. 16006

FRANK M. DEFINO,
Appellant,
v.
ROBERT S. MCNAMARA ET AL.,
Secretary of Defense
Appellees.

Appeal from the United States District Court For the District of Columbia

---

JURISDICTION

Judgment entered in this case on June 28, 1960. Notice of Appeal was filed on August 22, 1960 within 60 days after Judgment was entered in the District Court. Jurisdiction of this appeal is granted under Title 28 Section 1290 of the United States Code.

Statement

The appellant for over 15 years prior to May 28, 1957 was employed as a civil service employee of the United States and had obtained a Career Status under Executive Order 10577 and a veteran preference eligible employee as that term is defined under section 2 of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 851). The appellant was employed in the capacity of a Ground Powered Equipment Specialist Electrician in the Dept. of the Air Force in the U. S. Air Force Cambridge Research Center located at Bedford, Mass. Throughout these years he has been so employed his efficiency rating was either good or better or satisfactory.

On May 23, 1957 appellant received an official satisfactory

rating by civilian authority and had decided his retention in his civil service position. There were no charges of any kind file or preferred against the appellant for removal or any disciplinary action. Suddenly without warning on May 28, 1957, the appellant received an unofficial Military discharge by Col. Woodrow W. Dunlop who had decided and carried out his own military order of separation effective June 28, 1957.

In this military discharge Col. Dunlop a subordinate to the Executive unknown to the appellant made false and pretended, unsatisfactory charges of unsatisfactory performance of mechanical work duties not applicable to the appellant under civil service law, dating them far back to August 31, 1956, November 24, 1956, and January 27, 1957 and February 27, 1957, as an excuse for his illegal military actions, in defiance of the regulations of the Air Force implementing the Performance Rating Act.

The appellant appealed to the civil service commission rendering an unfair decision in departure of law holding the appellant was removed on charges of misconduct resulting in Satisfactory Performance. The appellees which include the civil service commission, the secretary of the Air Force and the Secretary of Defense moved for summary Judgment which the District Court below sustained.

Statement of Points on Appeal

1. The District Court below departed from the law and its usual judicial procedures sustaining appellees motion for summary judgment.

2. The District Court below departed from the law and its Judicial procedures when the court in holding that the appellant could be removed from his governmental position by an official of the military a subordinate who lacked authority to act as an Executive, accuser, Judge, and executioner in carrying out his own military order of separation in defiance of law is a fair hearing.

Appendix D

The United States Court of Appeals For the District of Columbia

Civil Action No. 16006
February 23, 1963

FRANK M. DEFINO,
Appellant,
v.
ROBERT S. MCNAMARA ET AL.,
Secretary of Defense,
Appellees.

Judgment

On Appellant's Motion For Leave To File A Satisfactory rating Report issued by law under the regulations of the Air Force required the Performance Rating Act to be followed.

Before: Judge Burger in Chambers

Opinion: "Appellant seeks restoration to his former position as an Electrician at an Air Force installation. His discharge from that position was upheld by the civil service commission. It is agreed that the statute authorized his dismissal ONLY to promote the efficiency of the Service. (Veterans Preference Act section 14 of June 1944 Title 5 USC section 863 (1958) (R.66).

Judge Burger in conflict with this decision on this same motion affirmed the decision of the District Court invoking the *Thomas* v. *Ward* case a non-veteran removed under the Lloyd-Lafollette act, had deprived the petitioner of due process of Appeal before the three Judges of the U. S. Appeals Court. (R-67).

The U. S. Appeals Court sustained appellant's dismissal without cause, appellant was entitled to appeal to the U. S. Court of Appeals before three Judges of this court for an

order to reverse the decision of the District Court of June 28, 1960.

The Court held the Department of the Air Force failed to uphold the Performance Rating Act and the dismissal was effected under part 22 of civil service regulations where an unsatisfactory rating was *not* issued to show cause for dismissal. A satisfactory rating would permit a dismissal without cause for a period of thirty days under section 14 of the Veterans Preference Act.

QUESTIONS PRESENTED ON APPEAL.

1. Whether a preference eligible may be discharged for the good of the service when his efficiency rating at the time of his discharge is satisfactory for retention under the law during his 15 years of Federal Service with the U. S. Government.

2. Whether the appellant may be removed from his governmental position by a Colonel who made the charges, judged his own charges, acted as prosecutor, Judge and executioner in defiance of law and whether this is a fair and proper hearing resulting in the dismissal of a long-time Satisfactory civil service employee.

Plaintiff's attorney of record files a motion for leave to file a satisfactory rating report required for retention by law.

On February 23, 1961 the appellant's motion for leave to file a satisfactory rating was heard in chambers of Judge Burger on the objections of the defendant, in a move to deny the motion for leave to file a satisfactory rating report.

Judge Burger in chambers denied the motion for leave and issued a ruling in accordance with the satisfactory rating of a preference eligible employee dismissed on

charges of alleged misconduct resulting in satisfactory performance, in absence of exercising the Performance Rating Act where it is mandatory to issue an unsatisfactory rating to show cause for removal under section 14 of the Veterans Preference Act. Such a removal is without cause. The ruling handed down by Judge Burger under section 14 of the Veterans Preference Act is without cause.

Justice Department moves to deny the Petitioner due process of appeal before three judges of the U. S. Appeals Court during this action on the Motion for Leave.

Under unusual circumstances in departure of law and judicial procedures of the U. S. Court of Appeals Judge Burger on a motion for leave to file a satisfactory rating report denied the motion and affirmed the Decision of June 28, 1960 of the District Court's illegal entry in the District Court's record. (See appendix B) The action of Judge Burger was to deprive the petitioner his right to appeal before three Judges of the U. S. Court of Appeals to obtain an order to reverse the illegal Decision of the District Court, thereby depriving the petitioner of a District Court order to restore the petitioner to his civil service position with all back pay and allowances.

In chambers on this same motion for leave in affirming the decision of the District Court applied the Lloyd-Lafollette act in conflict with Judge Burger's own ruling removal without cause under section 14 of the Veterans Preference Act. The Lloyd-Lafollette act was applied when the *Thomas* v. *Ward* case was invoked in affirming the decision of the Distrct Court.

Where the petitioner is subject only to the Veterans Preference Act as a preference eligible employee the ruling stands as is removal without cause under section 14 of the Veterans Preference Act entitling appellant to recover his

civil service pay after thirty days of dismissal under section 14 of the Veterans Preference Act. The law in part follows:

> **"No preference eligible employee in the civil service of the United States shall be discharged, suspended, or furloughed without pay for more than thirty days, except for cause that would promote the efficiency of the service."**

(See Appendix D) The petitioner moved to claim his civil service pay and allowances from his civil service position after thirty days of dismissal, in accordance with the U. S. Appeals Court ruling in the U. S. Court of Claims where the petitioner was denied the right to a court order to restore him to his civil service position in the U. S. Appeals Court.

Also on a second issue the petitioner moved to claim all of his civil service pay and allowances plus damages from the effective date of his military discharge. The military discharge was issued by Surprise by a military deputy commander who had decided and carried out his own order of separation pretending to be the executive directly under part 22 of civil service regulations in defiance of department of the Air Force Regulations implementing due process of civilian authority, invoking applicable decisions of the U. S. Supreme Court. (See R-1 page 20 and 34). (R-Gov. Ex. No. II.)

The U. S. Court of Claims refused petitioner relief, where the ruling of the U. S. Court of Appeals entitled petitioner to relief is a direct denial of the due process clause of the 14th Amendment. (R-66)

Appendix E

The United States Court of Claims

Civil Action No. 20-62
January 18, 1962

FRANK M. DEFINO,
Plaintiff,
v.
THE UNITED STATES,
Defendant.

Suit for Monetary Judgment

Before: Chief Judge Marvin Jones
Associate Judges Witaker, Davis, Durfee, Laramore.

Issue: Based on the U. S. Court of Appeals ruling of February 23, 1961 sustaining Plaintiff's military discharge without cause under section 14 of the Veterans Preference Act. (R-66)

Issue: To determine whether the Military discharge issued by a deputy commander pretending to be the Executive decided and carried out his own military order of separation in defiance of the Department of the Air Force regulations implementing and authorizing due process of civilian authority under the Executive the commanding general. (R-1 p. 34) and (Gov. R-Ex. No. II) Public Law 600.

Issue: To determine whether the civil service commission was arbitrary and capricious.

Relief based on the U. S. Court Appeals ruling removal without cause under sec. 14 of the Veterans Preference Act.
Authority: *Washington* v. *U. S.*, 344, 147 Fed. Supp. 284 U. S. Court of Claims granted relief to Negro Post Office

employee reversed the decision of the U. S. Court of Appeals for refusing to uphold section 14 of the Veterans Preference Act.

Relief based on the Military discharge in defiance of dept. of Air Force regulations issued by a deputy commander to the Executive in defiance of the Executive and the process of civilian authority.

Authority: Applicable decisions of the U. S. Supreme Court *Service* v. *Dulles*, 354, U.S. 363, 4 L. Ed. 2d 1403; *Wickersham* v. *U. S.*, Ct. Cl. (1906) S. Ct. 309, 471, 201 U.S. 3907 L. Ed. 798.

Issue: The reasons given for their unfair decision that the petitioner was removed for alleged misconduct resulting in Satisfactory performance does not comply with the regulations of the Air Force implementing the Performance Rating Act.

Issue: The decision of the Civil Service Commission sustaining petitioner's removal under section 14 of the Veterans Preference Act of alleged misconduct resulting in Satisfactory performance does not comply with the regulations of the Air Force 40-14 par. (d) page 2 (R Ex. B) requiring the Performance Rating Act to be followed in dismissing civil service employee, for cause. (See R-40-14 Ex. B pages 2 and 5.)

Authority: Helen I. Watson No. 49895 reasons given for alleged misconduct do not comply with the regulations of the Department of the Army. U. S. Supreme Court held dismissal invalid for failing to comply with the regulations of the Department of the Army.

The petitioner was denied the right to trial. The U. S. Court of Claims seized by the Justice Department in this case. (See appendix F.)

The Defendant admits Col. Dunlop a Deputy Commander

The Defendant in his second brief admitted after 5 years and 8 months Col. Woodrow W. Dunlop was deputy commander of Air Force Research Center under the Commanding general (191) top section. The defendant also admits that Col. Dunlop was installation Commander of the 6520th Air Base Group the military installation located alongside of the civilian installation. The civilian installation was the U. S. Air Force Cambridge Research Center where the petitioner was employed.

The Commanding general was the Executive and commanding officer over both the military and the civilian installations located at the L. G. Hanscom Field, Bedford, Mass. and in command over all of the geographical area of the Bedford Airfield. (See R-Gov. Ex. II page sections 1 and 2 par. A, B and C.) Pltf's (R-Ex. No. 4)

The defendant also admitted that the petitioner was issued a military discharge by deputy commander Col. Dunlop directly under part 22 of civil service regulations decided and carried out his own order of separation using his military title pretending to be the Executive of Air Force Cambridge Research Center the civilian installation where the petitioner was employed. (See R-191) Pltf's Ex. No. 4 and 5.

The removal notice bears the name of Col. Woodrow Dunlop as installation commander of the U. S. Air Force Cambridge Research Center the civilian installation where the petitioner was employed, pretending to be the Executive (R-56 and 57)

The defendant also admitted the military discharge was directly under part 22 of civil service regulations in defiance of the regulations of the Air Force 40-14 implementing the Performance Rating Act. (R-72 bottom page)

This admittance is relative to the fact that the military discharge was in defiance of the Executive authority under Public Law 600 title 5 U.S.C. section 22A, and in defiance of due process of civilian authority under (Gov. Exhibit R No. II) and in defiance of regulation 40-19 par. 5 E page 2 (R-Ex. C) denying the petitioner a hearing before discharge by civilian authority.

The Justice Department has seized the U. S. Court of Claims in this case. (Appendix F.)

Appendix F

The United States Court of Claims

WASHINGTON, D. C.

Civil Action No. 20-62
January 25, 1963

FRANK M. DEFINO,
Plaintiff,
v.
THE UNITED STATES,
Defendant.

SUMMARY JUDGMENT

~~January 7, 1963~~

~~ORAL ARGUMENT BEFORE~~: ~~Chief Judge Marvin Jones~~ ~~Associate Judges Witaker, Laramore, Durfee. Judge Davis declined to take any part in this action, did not appear.~~

~~Opinion~~: U. S. Court of Claims refused to hand down a ~~printed Opinion~~.

~~Typewritten Opinion~~: By Justice Department (R-219)

This case came before the Court on defendant's motion for Summary Judgment filed June 11, 1963 and plaintiff's Motion for Trial and alternative A Subsequent Motion For Final Judgment in favor of the Plaintiff and Motion For Court Order, filed July 11, 1963.

Upon consideration thereof, together with the opposition thereto; oral argument of plaintiff, pro se, and counsel for the defendant and the briefs of the parties, it is concluded that plaintiff is collaterally estopped to seek relief in this Court due to the previous decisions in the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia Circuit. It is further concluded that plaintiff has failed to show that the decision of the civil service commission

was arbitrary, capricious, or unsupported by substantial evidence, and

It is ORDERED that defendant's motion for Summary Judgment be and the same is granted, plaintiff's motion for trial and alternative a subsequent Motion for final Judgment in favor of the plaintiff and Motion for Court Order are denied, and plaintiff's petition is dismissed.

By Order of the Court

Unsigned: Marvin Jones Chief Judge.

(R-219)

Judge Davis declined any part in this action.

Appendix G

The United States Court of Claims
Washington, D. C.

Civil Action No. 20-62
Filed February 18, 1963
Denied April 5, 1963

FRANK M. DEFINO,
Plaintiff,
v.
THE UNITED STATES,
Defendant.

ON PETITION FOR RE-HEARING

Before: Judge Jones Chief Judge.

Issue: The U. S. Court of Claims refused or failed to hand down a printed opinion declaring the military discharge by a deputy commander who decided and carried out his own order of separation pretending to be the Executive directly under part 22 invalid.

Issue: Petitioner was entitled to relief in the U. S. Court of Claims based on the U. S. Appeals Court ruling under section 14 of the Veterans Preference Act. Removal without cause.

Issue: New proceedings were added on February 18, 1963 where petitioner first learned on January 7, 1963 after oral argument in the U. S. Court of Claims that the military discharge was substituted in place of a reduction in force notice under section 12 of the Veterans Preference Act.

Under section 12 of the Veterans Preference Act petitioner a preference eligible employee by law was entitled to receive a reduction in force notice on May 28, 1957 effective June 28, 1957 by a High Command reduction in

force order of 262 positions to be abolished by a reduction in force, issued on Jan. 25, 1957.

The petitioner was entitled to a reduction in force notice for retention under section 12 of the Veterans Preference Act in another similar position with the same civilian agency the U. S. Cambridge Research Center where the petitioner was employed.

The military discharge was substituted on May 28, 1957 effective June 28, 1957 to deprive petitioner his retention rights under section 12 of the Veterans Preference Act having higher retention rights under this law than any other civil service employee in the position and grade held by the petitioner at the U. S. Air Force Cambridge Research Center. (See Deft's R-Ex. No. 32)

Mr. R. M. Fitzpatrick made this confession in his affidavit to the U. S. Court of Claims who conspired with the military to seize control of civilian authority in defiance of Air Force Manual 40-1 sections 1 and 2 page 3 in (Gov. Exhibit No. II) filed in the records of this court.

The U. S. Court of Claims refusing to hand down a printed opinion in accordance with the law and applicable decisions of the U. S. Supreme Court invoked herein, the timely petition for re-hearing was denied on April 5, 1963. (R-268 Case No. 20-62)

By the Court

(Unsigned) MARVIN JONES
Chief Judge

Judge Davis declined to take any part in this action.

Pursuant to rule 30 of the U. S. Court of Claims the petitioner was refused the right to subpoena Col. Woodrow W. Dunlop who had escaped his military actions and never made himself known to the petitioner was protected by the Justice Department from facing the accused in a court of law.

The petitioner was denied the right to face his accuser in a court of law for the past six years, a direct violation of the due process clause of the 14 Amendment to the Constitution of the United States. This applies also to the military dicharge issued by a military deputy commander in defiance of due process of civilian authority under the Executive in defiance of law and the regulations of the department of the Air Force.

By authority of *Washington* v. *U. S.*, *Service* v. *Dulles*, *Helen T. Watson* v. *U. S.* and *Green* v. *McElroy et al.*, 360 U.S. 476 3 L. Ed. 2d 1377 the petitioner as a matter of Constitutional law is entitled to a writ of certiorari, to the United States Court of Claims.

Respectfully Submitted,
(s) FRANK M. DEFINO
Petitioner

Attorney of Record:
(s) FRANK M. DEFINO
Frank M. DeFino
28 Greenwood St.
Lowell, Mass.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 248

FRANK M. DELFINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims, embodied in its order (App. A, *infra*, pp. 17–18; R. 219–220), is unreported.

JURISDICTION

The order of the Court of Claims was entered on January 25, 1963 (App. A, *infra*, pp. 17–18; R. 219–220). A motion for rehearing was denied on April 5, 1963 (R. 268). The petition for a writ of certiorari was filed on July 1, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether petitioner's claim is barred by collateral estoppel, in light of prior adjudications in the

United States district court and the court of appeals.

2. Whether, irrespective of the issue of estoppel, the action of the Civil Service Commission, in sustaining the discharge of petitioner as a preference eligible under the Veterans' Preference Act of 1944, was supported by substantial evidence and in accordance with procedural requirements.

STATUTES INVOLVED

The Veterans' Preference Act of 1944, Section 14, as amended, 58 Stat. 390, 61 Stat. 723 (5 U.S.C. 863):

> No permanent or indefinite preference eligible * * * shall be discharged * * * except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge * * * is sought shall have at least thirty days' advance written notice * * * stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance * * * in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission * * *.

Performance Rating Act of 1950, Section 6, 64 Stat. 1099 (5 U.S.C. 2005):

> Each performance-rating plan shall provide for ratings representing at least (1) satisfactory performance, corresponding to an efficiency rating of "good" under the Veterans' Preference Act of 1944, as amended, and under laws superseded by this Act; (2) unsatisfactory performance, which shall serve as a basis for removal from the position in which such unsatisfactory performance was rendered; and (3) outstanding performance, which shall be accorded only when all aspects of performance not only exceed normal requirements but are outstanding and deserve special commendation. No officer or employee shall be rated unsatisfactory without a ninety-day prior warning and a reasonable opportunity to demonstrate satisfactory performance.

STATEMENT

1. THE UNDERLYING FACTS AND ADMINISTRATIVE PROCEEDINGS

Prior to his removal for cause on June 28, 1957, petitioner, a preference eligible under the Veterans' Preference Act, was employed as an electrician with the Department of the Air Force at the Cambridge Research Center, Lawrence G. Hanscom Field, Bedford, Massachusetts. On May 28, 1957, a Notice of Proposed Removal, signed by Colonel Woodrow W. Dunlop, the Installation Commander at Hanscom Field, was served on petitioner (Dft. Ex. 1, Tab. A).[1]

[1] Air Force Manual 40-1, Sec. 1, General Provisions, Par. 5b, dated July 30, 1951, provides that commanding officers of in-

This notice charged petitioner with (a) failure to carry out instructions promptly, (b) insubordination, and (c) violation of administrative regulations.

The notice also referred (Dft. Ex. 1, Tab. A) to a prior official reprimand on June 11, 1956, which stated that, as a result of repeated and intentional infractions by petitioner which created disturbances among shop personnel, petitioner had been reassigned to a different unit on July 1, 1956.

Petitioner was advised of his right to reply to the charges personally and in writing, advised of an official with whom he could discuss the case, and allowed 7 days within which to reply. (Dft. Ex. 1, Tab. A). On May 29, 1957, petitioner replied in writing to the charges (Dft. Ex. 1, Tab. B).

On June 6, 1957, petitioner was given a Notice of Final Decision signed by Colonel Dunlop in his capac-

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stallations are authorized by the Secretary of the Air Force to "appoint, assign, promote and demote, compensate, and separate civilian employees" (Dft. Ex. 17). Colonel Dunlop was designated by the Air Force as Installation Commander of Lawrence G. Hanscom Field from July 22, 1955, to August 21, 1957 (Dft. Ex. 18).

The respective exhibits have been lodged with the Clerk of this Court.

Specifications under (a) were that petitioner had failed, despite his supervisor's instructions, to perform promptly a weekly inspection of a power unit on August 31, 1956; to obtain transportation for the removal of certain equipment on November 26, 1956; and to clean a welder on January 17, 1957.

Charge (b) contained two specifications detailing acts of insubordination toward petitioner's civilian and military supervisors: petitioner refused to accept and sign for mechanical tools issued him, and he refused to report for a medical examination. In both instances petitioner demanded a written statement of authorization.

ity as Installation Commander, stating that petitioner's answer had been considered and was not deemed a satisfactory explanation of his conduct, and that he was being dismissed for "such cause as will promote the efficiency of the service." The removal decision was based on the three reasons given in the advance notice, and separation was effected as of June 28, 1957. Petitioner was advised of his right to appeal to the Civil Service Commission under Section 14 of the Veterans' Preference Act or to the Air Force through its grievance procedure, and advised of an official who could assist him in preparation of his appeal (Dft. Ex. 1, Tab C).

Petitioner did not avail himself of the Air Force grievance procedure, but, on June 7, 1957, appealed to the First Regional Office of the Civil Service Commission (Dft. Ex. 1; Tab D). After an investigation, that office conducted a hearing on July 9, 1957 (Dft. Ex. 1, Tabs E, F). At this hearing, petitioner was afforded opportunity to submit evidence and representations in support of his position; he availed himself of this opportunity (Dft. Ex. 1, Tab F). Prior to the hearing, petitioner's attorney withdrew and petitioner agreed that the hearing be carried on, petitioner acting as his own representative (Dft. Ex. 1, Tab H).

At the conclusion of the hearing, petitioner requested that it be reopened. In lieu of this, he accepted the Commission's offer permitting him to furnish additional evidence in writing. On August 14, 1957, through a new attorney, he submitted an additional statement arguing the evidence (Dft. Ex.

1, Tabs G, H, p. 3). The Commission held that the evidence substantiated charges (a) and (b), and found that petitioner's difficulties—

> were not due to personal prejudice and reprisal, but rather to his own resistance of and reluctance to submit to proper authority. [Dft. Ex. 1, Tab H, p. 10.]

The Commission held that petitioner's removal was warranted and was for such cause as would promote the efficiency of the service. It further found that the procedure of the Air Force conformed to the requirements of Section 14 of the Veterans' Preference Act of 1944 and Part 22 of the Civil Service Commission's regulations[3] (Dft. Ex. 1, Tab. H, pp. 9–10).

Petitioner, by letter dated September 11, 1957, took an appeal to the Commission's Board of Appeals and Review (Dft. Ex. 1, Tab I). The Board, on February 7, 1958, held that charges (a) and (b) were supported by the evidence and constituted proper cause for removal, and that the removal had been procedurally proper. After noting petitioner's satisfactory performance rating and awards for accepted suggestions, the Board stated, "It must be recognized, however, that these are evaluations of your work assignments, not your personal conduct. It is your conduct which is the basis for the separation." (Dft. Ex. 1, Tab J.).

[3] These regulations appear at 5 C.F.R. 22.201–22.205. And see, concerning appellate proceedings, 5 C.F.R. 22.501–22.607.

2. PRIOR COURT PROCEEDINGS

Following the decision of the Board, and prior to the instant action, petitioner instituted two suits based on the allegedly wrongful removal, both of which were decided against him. *DeFino* v. *Morgan*, D. Mass., No. 58–305–5 (dismissed, April 28, 1958, on defendant's motion; appeal dismissed on plaintiff's motion, September 10, 1958); *DeFino* v. *McNamara*, D.D.C., No. 880–58 (June 28, 1960, summary judgment for defendants), affirmed, 287 F. 2d 339 (C.A.D.C., 1961), certiorari denied, 366 U.S. 976, rehearing denied, 368 U.S. 872 (1961) (Dft. Exs. 2–31).

In the first action, petitioner sought an injunction restraining defendants from withholding his pay until defendants returned him to duty, and a declaratory judgment declaring that petitioner was entitled to be maintained as an employee at the research center (Dft. Ex. 2A). In substance, petitioner alleged that he was discharged in violation of the Veterans' Preference Act without cause and without the required 30-day notice, and in violation of the Performance Rating Act and implementing regulations, because he had received a satisfactory efficiency rating for the period in question (Dft. Ex. 2A, pars. 8–10). In an opinion dated April 28, 1958, the court dismissed plaintiff's complaint, finding that petitioner was separated from the service in accordance with the procedure prescribed by the Civil Service Commission (Dft. Ex. 3).

In his second action, filed in the District of Columbia on April 7, 1958 (Dft. Ex. 6), petitioner sought sub-

stantially the same relief as in the instant action (R. 44-45; Dft. Exs. 7, 8).[1]

Defendants' motion for summary judgment was granted upon the authority of *Hargett* v. *Summerfield*, 243 F. 2d 29 (C.A.D.C.), certiorari denied, 353 U.S. 970, and *Thomas* v. *Ward*, 225 F. 2d 958

[1] In the course of the district court proceeding petitioner made the following contentions:

(1) With respect to charges filed against petitioner alleging failure to carry out instructions, the orders were given without authority by officials who ordered petitioner to perform duties which were not part of the duties he was employed to perform (Dft. Ex. 7, par. 10);

(2) Petitioner was given a satisfactory rating as to work and conduct for the period of time during which the alleged improper conduct occurred; therefore, this was *res judicata* and no basis existed for filing the alleged and pretended charges (Dft. Ex. 7, par. 11);

(3) Petitioner was illegally dismissed on June 28, 1957 (Dft. Ex. 7, par. 12);

(4) The Board of Appeals and Review of the Civil Service Commission "refused, failed or neglected" to consider any legal points relative to charges being filed during a period of time when it had already been adjudicated that petitioner's work and conduct was satisfactory, and merely rubber stamped the Air Force decision; when the decision of the Board of Appeals and Review was presented to the Commissioners of the Civil Service Commission, although one Commissioner reviewing the file determined that the Board's decision should be reversed, the other two Commissioners refused to review petitioner's file, approving without justification the decision of the Board (Dft. Ex. 7, par. 13);

(5) Petitioner was discharged from his position by Colonel Dunlop, who had no authority and who left the installation shortly after the charges were filed; the authority to discharge petitioner rested with Commanding General Morgan and the latter never passed on the charges nor delegated the authority to Dunlop (Dft. Exs. 8, 9);

(6) Petitioner did not get a fair and honest hearing, since Colonel Dunlop, who signed the charges, acted in the capacity

(C.A.D.C.), certiorari denied, 350 U.S. 958 (Dft. Ex. 22). The Court of Appeals for the District of Columbia Circuit affirmed, noting (Dft. Ex. 25; 287 F. 2d 339):

> Appellant contends that a "satisfactory" rating received subsequent to the charged acts of insubordination demonstrates that his discharge did not satisfy the statutory criterion. But we have held that "though an employee's ordinary over-all performance of duties throughout the rating period may be rated as satisfactory he may still be guilty of conduct in connection with the execution of his official duties * * * which would justify dismissal * * * in the interest of promoting the efficiency of the service." *Thomas* v. *Ward*, 96 U.S. App. D.C. 302, 304, 225 F. 2d 953, 955 (1955), *cert. denied*, 350 U.S. 958 (1956). See also *Jones* v. *Hobby*, 96 U.S. App. D.C. 53, 223 F. 2d 345 (1955). Nor was there defect in the procedures employed here. *Ellis* v. *Mueller*, 108 U.S. App. D.C. 174, 280 F. 2d 722,

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of accuser, prosecutor and judge, ruling on the charges which he had previously filed against petitioner (Dft. Ex. 10);

(7) The removal notice stated that the decision was made in accordance with the provisions of Part 22 of the Civil Service regulations, whereas petitioner could only be removed in accordance with the provisions of Section 14 of the Veterans' Preference Act, 5 U.S.C. 863 (Dft. Ex. 11);

(8) The proceedings to remove petitioner were not in accordance with Air Force grievance procedure regulations applicable to employees at Cambridge Research Center; and, had they been followed, the decision in petitioner's case should first have been made by his superior (Dft. Ex. 11). The procedure relied on is quoted by petitioner but no citation is given for its source. However, the quoted portions are the same as AFCRCR 40-19 (Grievance Procedure), pars. 4(d), 6(c)(2) Ptf. Exhibit C.

cert. denied, 364 U.S. 883 (1960); *Harffett* v. *Summerfield*, 100 U.S. App. D.C. 85, 243 F. 2d 29, *cert. denied*, 353 U.S. 970 (1957).

Petitioner then filed his petition for a writ of certiorari in this Court (No. 1158–Misc., O.T. 1960) presenting substantially the same contentions as he had raised in the district court and court of appeals and later repeated in the instant action (R. 1–45; and see Argument *infra*, pp. 11–12). Certiorari was denied (366 U.S. 976; rehearing denied, 368 U.S. 872).

3. THE INSTANT CASE

In this proceeding, commenced on January 18, 1962, the Court of Claims granted summary judgment for the United States upon the basis that petitioner "is collaterally estopped to seek relief in [the Court of Claims] due to the previous decisions in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit" (App. *A*, *infra*, p. 17; R. 219). The Court of Claims further concluded that petitioner "has failed to show that the action of the Civil Service Commission was arbitrary, capricious or unsupported by substantial evidence" (App. A, *infra*, p. 17; R. 219).

ARGUMENT

1. The essentially factual questions raised by petitioner clearly do not warrant further review in this Court. The court below has held that prior adjudications in the case precluded petitioner's attempted re-

litigation of the same issues in the instant action. That ruling is plainly correct.

The effect of the decisions in other courts, particularly in the District Court and the Court of Appeals for the District of Columbia Circuit, was to determine that petitioner's removal was proper, for such cause as will promote the efficiency of the service, and in accordance with Section 14 of the Veterans' Preference Act and Part 22 of the Civil Service Commission's Regulations. In affirming, the Court of Appeals stated: "Nor was there defect in the procedures employed here," citing *Hargett* v. *Summerfield*, 243 F. 2d 29 (C.A.D.C.), certiorari denied, 353 U.S. 970 (1957); and *Ellis* v. *Mueller*, 280 F. 2d 722 (C.A.D.C.), certiorari denied, 364 U.S. 883 (1960).[5] And it expressly rejected petitioner's contention that his satisfactory performance rating precluded his removal, given "conduct in connection with the execution of his official duties * * * which would justify dismissal * * * in the interest of promoting the efficiency of the service."

It is clear that petitioner has tried to relitigate substantially the same case.[6] While petitioner did not specifically contend before the District Court, as he does in the instant action, that he was denied a hearing in person after a written request, that the notice of proposed removal and notice of removal were signed the

[5] The district court in Massachusetts was equally decisive: "All the steps that were taken to separate him from the service at Bedford were the steps prescribed by the Civil Service." (Dft. Ex. 3.)

[6] See the detailed comparisons in the government's Motion for Summary Judgment (R. 83–84, printed pagination 31–32).

same day pursuant to some sort of conspiracy, that one Captain Sleeth interfered in some undefined way with the hearing before the Civil Service Commission, or that the Commission refused to call Captain Sleeth and Colonel Dunlop as witnesses, petitioner nevertheless did allege and contend, in the district court, that there were numerous infractions of his rights by the agency and the Commission and specifically alleged that he was illegally dismissed. Moreover, the government there denied petitioner's allegations, opposed the numerous contentions and specifically alleged that no legal rights of petitioner were violated. Accordingly, petitioner's rights in regard to his removal were clearly and broadly placed in issue.

In the circumstances, the doctrine of collateral estoppel was appropriately applied by the Court of Claims. See *Commissioner v. Sunnen*, 333 U.S. 591, 601–602 (1948).[1] Petitioner has had his day in court.

[1] Petitioner attacks the decisions of the district court and the court of appeals, and the refusal of this Court to grant certiorari, alleging some sort of chicanery on the part of petitioner's counsel and defense counsel (R. 22, 24, 26), alleging that the court of appeals did not hear the case on appeal or make the recorded ruling (R. 29), and that the case was kept away from the Supreme Court (R. 30). But petitioner cannot be permitted to create triable issues in a new court by making vague and unspecific allegations concerning the conduct of attorneys. Had there been any substance to these assertions, then the proper avenue for relief was in the district court. See Rule 60, F.R. Civ. P.

Petitioner also contends that the question of Dunlop's lack of authority was not decided by the district court (R. 28, 29), but, in this, he is in error (Dft. Ex. 31; see also Dft. Exs. 14, 24).

2. Moreover, if one were to assume that petitioner's claim were not barred by estoppel, he could not prevail. For, as the Court of Claims ruled, petitioner's removal from government employment was properly sustained by the Civil Service Commission upon the basis of substantial evidence and sound procedures (R. 219–220).

Petitioner's principal complaint here, as in the various courts below, is that the "satisfactory" performance rating, given him by his supervisor subsequent to the charged acts of insubordination, precludes his dismissal. But, while an employee's ordinary over-all performance of duties in a performance rating period may be rated satisfactory, he may still be guilty of conduct in connection with the execution of his duties, either in particular instances or in a particular aspect of his tasks, which would justify dismissal in the interest of promoting the efficiency of the service. This was true in petitioner's case. Both the Court of Appeals for the District of Columbia Circuit and the Court of Claims have consistently held that there is nothing in the Performance Rating Act of 1950 which requires the giving of an "Unsatisfactory" performance rating as a condition precedent to removal to promote the efficiency of the service, under either the Lloyd-LaFollette Act, 5 U.S.C. 652, or the Veterans' Preference Act. *DeFino* v. *McNamara*, 287 F. 2d 339 (C.A.D.C.), certiorari denied, 366 U.S. 976; *Thomas* v. *Ward*, 225 F. 2d 953 (C.A.D.C.), certiorari denied, 350 U.S. 958; *McGinty* v. *Brownell*, 249 F. 2d 124 (C.A.D.C.), certiorari denied, 356 U.S. 952; *Jones* v. *Hobby*, 223 F.

2d 345 (C.A.D.C.); *DeBusk* v. *United States*, 132 Ct. Cl. 790, certiorari denied, 350 U.S. 988;[8] *Hoppe* v. *United States*, 136 Ct. Cl. 559, certiorari denied, 355 U.S. 816; *Misuraca* v. *United States*, 135 Ct. Cl. 387.[9]

Equally lacking in merit is petitioner's contention that his dismissal was procedurally defective. As a preference eligible, his procedural rights were governed by the Veterans' Preference Act of 1944 and the implementing regulations promulgated by the Civil Service Commission. All rights thereunder were accorded petitioner. Petitioner had the right to pursue the grievance procedure offered by the Air Force, but he did not choose to invoke it. He asked for, and received, his administrative review by the First Civil Service Region and by the Board of Appeals and Review of the Civil Service Commission,

[8] In the *DeBusk* case, as here, the employee received a "Satisfactory" performance rating subsequent to the acts of insubordination which were made the basis of his dismissal. The Court of Claims held that the employee could be removed to promote the efficiency of the service within the meaning of Section 14 of the Veterans' Preference Act, regardless of the fact that he had not been given an "Unsatisfactory" performance rating under the Performance Rating Act of 1950.

[9] *Lettl* v. *Wilson*, 148 F. Supp. 215 (D.D.C.), relied on by petitioner (Pet. 13), is not in point. There, an employee of the Army was given notice of an "Unsatisfactory" performance rating under the Classification Act of 1923 (later superseded by the Performance Rating Act of 1950). Subsequently, he was given a within-grade pay raise, which, under applicable Army regulations, served to cancel the warning notice. The court simply held that the Army must abide by its own regulations. Additionally, it is to be noted that the *Lettl* case involved a removal for failure to attain a satisfactory rating, not to promote the efficiency of the service, as is the case here. The cases cited in the text point out that these two classes of dismissal are distinct.

both of whom found that the Air Force had fully complied with the procedural safeguards afforded a preference eligible under the statute and regulations. Two district courts, one court of appeals, and now the Court of Claims have reached the same conclusion. Petitioner's arguments to the contrary are insubstantial.[10]

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[10] Petitioner's arguments involve extensive portions of the record and exhibits for full exposition of their inaccuracies and error. The details of the corrections appear in the government's "Defendant's Motion for Summary Judgment" (R. 83, ff.) and in "Defendant's Reply to Plaintiff's Opposition" (R. 179, ff.) in the Court of Claims and will not be repeated *in extenso* here. Petitioner, for example, despite his election of Civil Service Commission appeal rather than Air Force procedures (upon clear notice of the nature of that election, Dft. Ex. 1, Tab C), now confuses aspects of the latter procedures with the former, and complains (Pet. 16) of the absence of certain Air Force procedures. These were obviously not to be accorded to him, in light of his own election of a different review procedure. See more extensive discussion at R. 201–203 (Reply to Petitioner's Opposition, *supra*, printed pagination pp. 17–19). Petitioner, under similar misapprehension, complains (Pet. 15) of a lack of personal hearing before the commander of the installation, but ignores his own failure to elect such hearing or to complain, seasonably, of the lack thereof, in the extensive administrative review. See Dft. Ex. 1, and R. 71 (Motion, *supra*, printed pagination, p. 19); R. 194–197 (Reply, *supra*, printed pagination, pp. 10–13). Further instances of petitioner's assumptions of his own version of facts, or interpretations of decisions or enactments, appear in his petition, but their lack of substance or merit is patent upon the record without need of further emphasis here.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1963.

APPENDIX

ORDER OF THE COURT OF CLAIMS ENTERED ON JANUARY 25, 1963

No. 20–62

FRANK M. DEFINO

v.

THE UNITED STATES

ORDER

This case comes before the court on defendant's motion for summary judgment, filed June 11, 1962, and plaintiff's motion for trial and alternative a subsequent motion for final judgment in favor of the plaintiff and motion for court order, filed July 11, 1962. Upon consideration thereof, together with the opposition thereto, oral argument of plaintiff, pro se, and counsel for defendant and the briefs of the parties, it is concluded that plaintiff is collaterally estopped to seek relief in this court due to the previous decisions in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. It is further concluded that plaintiff has failed to show that the action of the Civil Service Commission was arbitrary, capricious or unsupported by substantial evidence, and

It is ordered, That defendant's motion for summary judgment be and the same is granted, plaintiff's motion for trial and alternative a subsequent motion for final judgment in favor of plaintiff and

motion for court order are denied, and plaintiff's petition is dismissed.

BY THE COURT,

MARVIN JONES,
Chief Judge.

Judge Davis took no part in the consideration and decision of this case.

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